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No. 88-15

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHIPMAN FREIGHT SERVICES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly held that a union did not violate the "secondary boycott" provisions of the National Labor Relations Act by picketing petitioner's warehouse facilities on behalf of independent truckdrivers who were seeking the reinstatement of agreements to carry freight that petitioner had cancelled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 843 F.2d 1224. The decision and order of the National Labor Relations Board (Pet. App. A8-A13), including the decision of the administrative law judge (Pet. App. A14-A36), is reported at 283 N.L.R.B. No. 57.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1988. The petition for a writ of certiorari was filed on July 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Chipman Freight Services, transports containerized cargo in and out of its warehouse terminals in Oakland, California, using its own drivers, its customers' drivers, or independent contractors known as "subhaulers." Prior to July 1985, each of petitioner's 22 subhaulers performed work under a uniform agreement that was terminable at will by either party. Petitioner then notified its subhaulers that the agreements had been terminated and that they would have to sign new agreements, with terms the subhaulers viewed as less favorable, in order to continue to transport its freight. Only four of the subhaulers signed new agreements and received further work from petitioner. Pet. App. A9, A17-A18.

At the time that petitioner cancelled the subhaul agreements, the Brotherhood of Teamsters and Auto Truck Drivers, Local 70 of Alameda County (the Union) was engaged in a campaign to organize the independent owner-drivers in the Oakland area. In attempting to regain work from petitioner, some of the subhaulers sought the Union's assistance. On the day after petitioner cancelled the agreements, a Union agent asked petitioner to reinstate the old subhaul agreements and to recognize the Union as the representative of its subhaulers. Petitioner refused to do so. About a week later, most of petitioner's subhaulers met with the Union agent and voted to continue to press for reinstatement of the old agreement and to picket petitioner in support of that demand. The Union agreed to support the picket line until petitioner took back all of the subhaulers under the old agreement, and picketing by the Union began that day. The four subhaulers who had signed new agreements and some of petitioner's customers refused to cross the picket lines. Pet. App. A9-A10.

Petitioner subsequently rejected a renewed request by the Union for recognition on the ground that the sub-

haulers were not its employees, and the Union then stated that, while it "would like to gain recognition," the sole purpose of the picketing was to get the subhaulers back to work under the old agreement. Petitioner thereafter wrote to the individual subhaulers expressing its continuing interest in negotiating new contracts. The Union proposed that the old agreement be reinstated, pending negotiations between petitioner and a committee designated by the subhaulers, in which the Union would not participate. Petitioner replied that it was unwilling to reinstate the old agreement, and would not meet with groups of owner-operators, citing potential antitrust ramifications. Picketing by the Union continued for three months, when it was enjoined by the Ninth Circuit. Pet. App. A10-A11, A22-A23.

2. On a charge filed by petitioner, the Board's Regional Director issued a complaint alleging inter alia that the Union had violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (NLRA or the Act), 29 U.S.C. 158(b)(4)(i) and (ii)(B), by picketing petitioner with the object of interrupting the business relations between petitioner and its subhaulers. Pet. App. A12.

The Board, in disagreement with the administrative law judge, determined that the Union had not violated the Act by picketing petitioner's facilities because petitioner "is not a neutral party but is directly and intimately involved in the underlying dispute" (Pet. App. A12). In so holding, the Board relied on its decision of the same date in *Production Workers Local 707* (*Checker Taxi*), 283 N.L.R.B. No. 56 (Mar. 26, 1987), on remand from the District of Columbia Circuit's decision in *Production Workers Local 707* v. *NLRB* (*Checker Taxi*), 793 F.2d 323 (1986).[1] Thus

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[1] In a prior decision, *Production Workers Local 707* (*Checker Taxi*), 273 N.L.R.B. 1178 (1984), the Board found that a union vio-

the Board, finding that "[t]he subhaulers' dispute was solely with Chipman, and the [Union's] picketing on behalf of the subhaulers was directed against Chipman," concluded that the picketing was "primary activity that does not violate Section 8(b)(4)(B) of the Act" (Pet. App. A12-A13).

3. The court of appeals affirmed the Board's decision dismissing the unfair labor practice complaint (Pet. App. A1-A7). The court concurred in the conclusion of the District of Columbia Circuit in *Production Workers Local 707* that "the core distinction between primary and sec-

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lated Section 8(b)(4) by picketing taxicab companies on behalf of the drivers of leased cabs, who were independent contractors rather than employees of the cab companies with whom they were engaged in a dispute as to the terms of their leasing contracts. The court of appeals rejected the Board's premise that Section 8(b)(4) prohibits union involvement in all picketing by or on behalf of independent contractors. It held that Section 8(b)(4) bars only secondary activity, which it defined as "pressure * * * brought against a third party not involved in the underlying dispute" (793 F.2d at 329), and concluded that the cab companies were "not at all neutral" since the "dispute over contract terms lies precisely and only with the cab companies" (*id.* at 333). On remand, the Board agreed with the court of appeals that pressure exerted on a neutral party is a necessary predicate to finding a violation of Section 8(b)(4) and that the cab companies were not neutral parties to the dispute; it determined that the union's "picketing was primary activity which does not fall within the proscriptions of Section 8(b)(4)." 283 N.L.R.B. No. 56 at 5, 6 (Pet. App. A88, A91). The Board further concluded that the fact that the dispute with the cab companies did not concern "employees" as defined by the NLRA "is not determinative of whether the picketing was applied against a neutral party that Section 8(b)(4) is intended to insulate from labor disputes," and that it had erred previously by focusing exclusively on the nonemployee status of the cab drivers and "disregarding the nonneutral status of the cab companies." 283 N.L.R.B. No. 56 at 6 (Pet. App. A91, A92).

ondary activities is the neutrality of the entity against which the disputed activity is directed" (Pet. App. A6). It agreed with the Board that the Union's picketing did not violate Section 8(b)(4) since petitioner "is clearly not a neutral third party, because agreements it attempted to impose upon the independent subhaulers are the sole object of the picketing" (Pet. App. A7).

The court of appeals rejected petitioner's contention that, because it was undertaken on behalf of independent contractors, the Union's picketing was not covered by the proviso to Section 8(b)(4) which privileges primary picketing. The court noted that "section 8(b)(4) nowhere defines a protected primary strike in terms of the employer-employee relation[ship]" (Pet. App. A3). The court acknowledged that independent contractors are not covered by the protections of the NRLA, but said that it does not follow that the Act proscribes union activity on behalf of independent contractors. The court pointed out that Section 13 of the NLRA, 29 U.S.C. 163, which provides that "except as specifically provided" the Act may not be interpreted to limit the right to strike, "makes no reference to limiting its application to the employer-employee relation" (Pet. App. A4).

Similarly, the court rejected petitioner's contention that because a strike is defined in the Labor-Management Relations Act, 29 U.S.C. 142(2), as a "stoppage of work by employees," Section 13 must be read as addressed only to such work stoppages. The court noted that, in the portion of the NLRA containing Section 8(b), a labor dispute is defined as including "any controversy * * * regardless of whether the disputants stand in the proximate relation of employer and employee" (29 U.S.C. 152(9)), which suggests that the drafters of Section 13 intended to allow unions to act on behalf of other parties to labor disputes

"subject to the same general strictures" that apply when they act on behalf of persons who are "employees" under the NLRA (Pet. App. A4-A5).

Finally, the court rejected petitioner's contention that the "touchstone" test of primary activity articulated in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967)—"whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" (*id.* at 645 (footnote omitted))—establishes that protected primary activity is only activity concerning the wages, hours, or working conditions of employees. The court of appeals, noting that in *National Woodwork* this Court did not consider the impact of its holding "should one of the parties to the dispute not be a statutory employee," concluded that it "would distort" *National Woodwork* to place "undue emphasis on the particular words of the 'touchstone' test [instead of] look[ing] to the basic distinction drawn by *National Woodwork* between a strike against a primary disputant and one against an unoffending neutral" (Pet. App. A5-A6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Section 8(b)(4)(ii)(B) of the NLRA prohibits a union from inducing strikes or from threatening, restraining, or coercing any person with an object of "forcing or requiring any person to * * * cease doing business with any other person." It is true, as petitioner asserts (Pet. 6-7), that the Union's conduct here comes within the literal proscription of Section 8(b)(4)(ii)(B) in that it seeks to cause the independent subhaulers and others to cease do-

ing business with petitioner. However, the proviso to 8(b)(4)(ii)(B) excludes from its proscription "where not otherwise unlawful, any primary strike or primary picketing." Section 13 of the Act reinforces that limitation by providing that "[n]othing in [the Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." "By § 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or dimunition is 'specifically provided for' in the Act." *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 673 (1951) (footnote omitted); see also *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 234-235 (1963).

Indeed, even before the proviso was added to the Act's secondary boycott provisions in 1959, this Court made clear that they "could not be literally applied." *Local 761, Elec. Workers* v. *NLRB*, 366 U.S. 667, 672 (1961). Rather, the dual congressional purposes were to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and * * * [to] shield[ ] unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951). Similarly, in *National Woodwork*, the Court cautioned that although the word "secondary" nowhere appears in the statute, Section 8(b)(4) prohibits only "secondary" activity, and thus is "limited to protecting employers in the position of neutrals between contending parties" (386 U.S. at 625), and protects an employer "only from union pressures designed to involve him in disputes not his own" (*id.* at 626 (footnote omitted)). See also

NLRB v. *Pipefitters*, 429 U.S. 507 (1977).[2]

In this case the independent contractors had a dispute with petitioner over their working conditions, and the Union picketed petitioner on their behalf. Had the Union picketed petitioner in the same circumstances on behalf of

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[2] Petitioner's reliance (Pet. 7) on this Court's reference in *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982), to the plain language of Section 8(b)(4)(ii)(B) is misplaced. In the portion of the opinion from which petitioner selectively quotes, the Court explained that the statutory proscription reaches many forms of boycotts, political as well as economic, and went on to say that the "prohibition was drafted broadly to protect neutral parties, 'the helpless victims of quarrels that do not concern them at all' " (456 U.S. at 225 (citation omitted)). The opinion nowhere suggests that the prohibition is so broadly drawn as to prohibit the picketing of non-neutrals; to the contrary, it makes clear that the statutory prohibition is directed only at "secondary boycotts" and prohibits only coercion of neutrals. *Id.* at 222 n.19, 223 & n.20, 225.

There is no merit to petitioner's additional contentions (Pet. 8, 9) that Section 8(b)(4) "merely codifies" the common law of tortious interference with business relations, and that, read as prohibiting union picketing on behalf of independent contractors regardless of the neutrality of the picketed entity, Section 8(b)(4) is "part of the balance struck by Congress * * * [t]o achieve the ultimate goal of the NLRA—the preservation of the free flow of interstate commerce" (Pet. 9). This Court has consistently reiterated that the congressional purpose in enacting Section 8(b)(4) was to proscribe certain "isolated evils" (*NLRB* v. *Drivers Local 639*, 362 U.S. 274, 284 (1960)), and it has "not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history' that Congress intended to do so as regards the particular ends of the picketing under review." *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 62-63, (1962) (quoting *Drivers Local 639*, 362 U.S. at 284). It has instead repeatedly and invariably held that in enacting Section 8(b)(4) " 'Congress meant [to] reach only secondary pressures.' " *NLRB* v. *International Longshoremen's Ass'n (ILA)*, 473 U.S. 61, 74 (1985) (quoting *National Woodwork*, 386 U.S. at 638); accord *Houston Insulation Contractors Ass'n* v. *NLRB*, 386 U.S. 664, 668 (1967).

petitioner's employees rather than on behalf of independent contractors, there could be no doubt that its action would be deemed lawful primary activity. The Board concluded here only that the nonemployee status of the independent contractors was not controlling as to whether the Union's conduct was lawful primary or unlawful secondary activity. That position, as the court of appeals properly concluded, is a " 'reasonably defensible' " interpretation of the Act (Pet. App. A2, quoting *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 497 (1979)).

2. There is no merit to petitioner's contention (Pet. 13-14) that the decision in this case conflicts with *NLRB* v. *International Longshoremen's Ass'n,* 473 U.S. at 61, 81 (1985), where the Court, citing *National Woodwork* and *Pipefitters,* looked at whether the union activity at issue sought to affect the relations of an employer vis-a-vis his own employees rather than those of neutral employers. *National Woodwork, Pipefitters,* and *ILA* all involved union efforts to secure work for employees rather than independent contractors and accordingly, in those cases, the Court generally described permitted primary activity as conduct addressed to the relations between the affected employer and "his own employees" (see *National Woodwork,* 386 U.S. at 644, 645; *Pipefitters,* 429 U.S. at 528, 531) or "affecting employees' wages, hours, or working conditions that the employer can control" (*ILA,* 473 U.S. at 81), as distinguished from activity "tactically calculated to satisfy union objectives elsewhere" (*National Woodwork,* 386 U.S. at 644; *Pipefitters,* 429 U.S. at 528; *ILA,* 473 U.S. at 75, 77). However, nothing in those cases suggests that permitted primary activity can be engaged in only on behalf of statutory employees; all three make clear that the necessary predicate for a Section 8(b)(4) violation is union pressure directed towards an uninvolved neutral (386 U.S. at 644-645; 429 U.S. at 511, 523; 473 U.S. 74,

81), and that the determination of whether a union has exerted prohibited secondary pressure must be made in light of all the relevant circumstances (386 U.S. at 644; 429 U.S. at 521-528; 473 U.S. at 81).[3]

Equally flawed is petitioner's contention (Pet. 10-12) that the decision below conflicts with the decision of the Second Circuit in *NLRB* v. *Local 3, IBEW,* 542 F.2d 860 (1976), and that of the Seventh Circuit in *Local 399, IBEW* v. *NLRB,* 601 F.2d 593 (1979), upholding the Board's decisions that governmental entities were neutral parties in certain disputes between unions and private employers despite the fact that the government entities had power to resolve the disputes.[4] Contrary to petitioner's

[3] In *ILA,* the Court observed that "[t]he various linguistic formulae and evidentiary mechanisms we have employed to describe the primary/secondary distinction are not talismanic nor can they substitute for analysis. The inquiry is often an inferential and fact-based one, at times requiring the drawing of lines 'more nice than obvious.' " 473 U.S. at 81 (citation omitted).

[4] In *NLRB* v. *Local 3, IBEW,* Local 3 caused a shutdown of all work at School Board sites to force the School Board to award contracts only to electrical contractors using employees referred by Local 3. The Second Circuit agreed with the Board that Local 3's primary dispute was with the contractors who were using employees referred by another union, and that the School Board was a neutral party entitled to the protection of Section 8(b)(4). In *Local 399, IBEW* v. *NLRB,* the court of appeals enforced, without opinion, the Board's determination that a union violated Section 8(b)(4) by picketing facilities containing equipment leased by Illinois Bell to the State of Illinois to enforce Illinois Bell's agreement with the union that all work on Illinois Bell equipment would be performed by Local 399 members. The Board found that the "Union's dispute with the State was secondary as it had only arisen because of its primary and underlying dispute with Bell Telephone relating to the leasing of [equipment] to the State" (235 N.L.R.B. 555, 559 (1978)), and that the picketing violated Section 8(b)(4) because it was "designed to satisfy [the union's] objectives in its relationship with Illinois Bell" (235 N.L.R.B. at 555).

assertion, the court of appeals here did not rule that the Union's picketing was "primary" simply because of petitioner's "ability to resolve the dispute"; it held that petitioner was not a neutral third party because the dispute underlying the Union's picketing was entirely and only with petitioner. That holding presents no conflict with the cases on which petitioner relies.[5]

3. There is no merit to petitioner's additional contention (Pet. 14-16) that Section 13 of the Act does not apply to picketing on behalf of independent contractors. Nothing in the language of Section 13 limits the right to strike to activity taken on behalf of statutory employees.[6] And, as the court of appeals noted (Pet. App. A4), "circumscription of the scope of the Act's protections is not synon-

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[5] Both of the cited cases involved statutory employees. Accordingly, like this Court in *National Woodwork, Pipefitters,* and *ILA,* the courts of appeals described the primary/secondary dichotomy in terms of employer/employee relationships, but nowhere suggested that Section 8(b)(4) prohibits union picketing on behalf of independent contractors.

[6] Also without merit is petitioner's claim (Pet. 14-16) that Section 13 must be limited to action on behalf of statutory employees because of the language of Section 501(2) of the Labor-Management Relations Act, 29 U.S.C. 142(2), which provides that "[t]he term 'strike' includes any strike * * * by employees." That Section does not provide that *only* activity on behalf of employees shall be considered strike activity and, in any event, as the court of appeals noted, Section 2(9) of the NLRA, 29 U.S.C. 152(9), expressly provides that labor disputes are not limited to those arising in an employee/employer relationship. Petitioner errs (Pet. 15) in contending that *Soft Drink Workers, Local 812* v. *NLRB,* 657 F.2d 1252 (D.C. Cir. 1980), is to the contrary. The court in that case held that the determination of whether union conduct violates Section 8(b)(4) does not turn on the existence of a traditional labor dispute, but on whether the "challenged union conduct * * * [has] as an object forcing or requiring a neutral business to cease doing business with another business" (657 F.2d at 1261), an analysis in accord with that of the court of appeals' decision here.

ymous with an expansion of its prohibitions." Thus, while an employer could not discharge employees who engaged in lawful picketing, it could refuse to contract with independent contractors who engaged in such picketing. It does not follow, however, that because independent contractors are not covered by the protections of the Act, union activity on their behalf is secondary activity within the meaning of Section 8(b)(4) of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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